90-1746

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ROGER SMITH TROEN, Petitioner

v.

STATE OF OREGON, Respondent

ON WRIT OF CERTIORARI TO
THE SUPREME COURT
OF THE STATE OF OREGON

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

1. Does the Sixth Amendment, made applicable to the states through the Fourteenth Amendment, prevent a state from erecting arbitrary evidentiary barriers to the receipt of otherwise relevant evidence which raises the defense of necessity?

2. Does the Oregon Supreme Court deny a defendant his right to present a defense under the Sixth and Fourteenth Amendments when it concludes that the defense of necessity, under these facts, is, as a matter of law, inconsistent with some other provision of law, to-wit: 9 CFR § 3.1, et seq.?

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IV. PETITION FOR CERTIORARI

The petitioner, Roger Smith Troen, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Oregon, entered in the above-entitled proceeding on December 4, 1990.

V. OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon which affirmed the order of the trial court barring the receipt of any evidence to establish the defense of Choice of Evils (necessity) is attached herein as Appendix D. The order of the Supreme Court of the State of Oregon denying petitioner's petition for review of the decision of the Court of Appeals of the State of State of Oregon, without opinion, is attached as Appendix E.

VI. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

VII. CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI, United States Constitution. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crimes shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

Amendment XIV, United States Constitution. "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

VIII. STATEMENT OF THE CASE

On March 30, 1987, a group of unknown individuals entered a University of Oregon psychology department laboratory building, in Eugene, Oregon. Facts developed in a subsequent police investigation revealed that those persons who entered the laboratory facility removed a number of laboratory animals from the premises, damaged certain laboratory equipment, and spray-painted "Animal Liberation Front" (ALF) slogans on laboratory walls. Subsequent to the break-in, a news communique was delivered to a local television station by unknown representatives of ALF. In that communique, responsibility was accepted for the break-in, and a list of abuses of

laboratory animals by the research facility was offered as justification for the break-in. On April 22, 1987, petitioner alone was indicted by the grand jury of Lane County, Oregon, on charges of CONSPIRACY TO COMMIT BURGLARY IN THE SECOND DEGREE, BURGLARY IN THE SECOND DEGREE, and THEFT IN THE FIRST DEGREE, respectively violations of Oregon Revised Statute sections 161.450, 164.215, and 164.055, upon the allegation that he aided and abetted the principals to the offenses.

To the charges in the indictment, the petitioner pled not guilty. In a timely fashion thereafter, he filed the requisite statutory notice of intent to raise the defense of Choice of Evils (necessity). Oregon Revised Statutes 161.055 and 161.200.

Upon receipt of the notice of intent to rely upon the defense of Choice of

Evils, the state filed a pre-trial motion in limine, in which it sought to preclude the petitioner from offering any evidence in support of the defense of Choice of Evils. The trial court then permitted an extensive offer of proof made by the petitioner (Tr. 30-614).[1] A summary-form offer of proof was also made by counsel for the state in support of its pre-trial motion to limit introduction of evidence (Tr. 619-625).

Petitioner's evidentiary offer of proof consisted of essentially the entirety of what would have been his case-in-chief before a jury. It included the extended testimony of 16 separate witnesses, both lay and professional, as well as 28 separate exhibits. The exhibits themselves

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[1]"Tr." refers to transcript of proceedings in trial court; "Ex." refers to trial court exhibits received.

were compromised of publicly available reports, which described the principal animal research being conducted at the University of Oregon research facilities (petitioner's Exs. 118, 119, 120); graphic photographic evidence of research practices and abuses (petitioner's Exs. 101-112); graphic video-taped documentaries of other similar research practices and animal abuses (petitioner's Exs. 114, 115, 116); various governmental inspection reports and policies (petitioner's Exs. 113, 121, 123); and a video-taped deposition and transcript of witness Lucinda Muniz, who was the citizen member of the University of Oregon Institutional Animal Care and Use Committee. The purported function of this committee was to critically review and approve or disapprove certain research proposals and practices based upon, among other factors, veterinary and ethical

considerations of the welfare of the subject animals (petitioner's Exs. 124, 126). The testimony of Muniz revealed the sham nature of the operation of this committee.

Also included among the petitioner's proffered evidence was testimony from hostile witnesses, Dr. Richard T. Marracco, Dr. Barbara Gordon-Lickey, and Gregory Stickrod, who were, respectively, the principal researchers involved, and the director of animal care and use at the University of Oregon. Testimony was also taken from several individuals, who had previously been students at the University of Oregon, employed to work in various capacities in the animal research laboratories. Testimony was also taken from a number of expert witnesses, concerning animal research practices and the growing awareness in the scientific

community of the abusive practices regarding the animal subjects so employed. Proffered testimony was also taken from the petitioner, which established his long-standing involvement in matters of animal welfare, his vast lay knowledge of widespread abuses among animal researchers generally, and the researchers at the University of Oregon specifically. Petitioner also testified concerning his and others' protracted past unsuccessful efforts to get the University of Oregon administrators and animal researchers to voluntarily reform their policies and practices regarding the use of animals in research. Petitioner also testified regarding his reasonable beliefs as to the necessity of his actions aiding and abetting those involved in the laboratory break-in.

After consideration of the extensive

offer of proof of petitioner and the more limited summary-form proffer of the state, and after having considered respective legal arguments, the trial court granted the state's motion to preclude the receipt of any and all evidence proffered by petitioner in support of the defense of Choice of Evils. The trial court ruled that the entirety of petitioner's evidence was irrelevant and inadmissible to raise the defense of Choice of Evils as a matter of law. See Appendix A. Petitioner then was tried upon stipulated facts and convicted. The judgment orders of conviction are set forth at Appendices B and C. Petitioner then appealed to the Court of Appeals of the State of Oregon. The Oregon Court of Appeals in its opinion (Appendix D) held that petitioner was not entitled, as a matter of law, to present the proffered evidence in support of a

defense of Choice of Evils. It reasoned, inter alia, that petitioner's asserted defense of Choice of Evil was "inconsistent * * * with some other provision of law," citing the related Oregon Court of Appeals decision of State v. Clowes, 100 Or. App. 266, 785 P.2d 1071 (1990), decision on petition for review by Oregon Supreme Court at 310 Or. 686, 801 P.2d 789 (1990).

In petitioner's case, the Court of Appeals reasoned that it was the "extensive federal regulations" governing the treatment of animals used in experimentation, under 9 C.F.R. § 3.1 et seq., which authorized the conduct petitioner asserted was the greater harm sought to be avoided. The court also opined that petitioner had failed to allege in his proffer at the trial court specific violations of those regulations which would further justify his conduct under a defense

of Choice of Evils (see decision of Court of Appeals, Appendix D at page 4). But see petitioner's proffer for such detailed instances of federal and state law violations.

Petitioner then sought review to the Oregon Supreme Court, which court denied review without opinion (Appendix E).

IX. REASONS WHY THE ISSUES PRESENTED HAVE IMPORTANCE BEYOND THE PARTICULAR CASE AND REQUIRE A DECISION BY THE UNITED STATES SUPREME COURT

A. The Sixth and Fourteenth Amendments prevent states from erecting arbitrary evidentiary barriers to the receipt of otherwise relevant evidence which raises the defense of necessity.

That the states have the authority to enact their own rules of evidence concerning the trials of state crimes is not doubted. The United States Supreme Court has held, however, that a limitation upon such evidentiary rulemaking is the Due

Process Clause of the Fourteenth Amendment. Spencer v. Texas, 385 U.S. 554, 568-569 (1966). In petitioner's case, as in the companion case of State of Oregon v. Clowes, 310 Or. 686, 801 P.2d 789 (1990), the Oregon court contorts a basic definition of relevancy as the means by which it justifies the exclusion of evidence which tends to raise the defense of Choice of Evils. See State v. Clowes, supra, at 691-692. Such an exercise is precisely what the United States Supreme Court has previously condemned as a mechanistically applied rule which defeats the ends of justice. Chambers v. Mississippi, 410 U.S. 284, 302 (1973). In that case the Court held that the Mississippi hearsay rule, as applied, stood as a barrier to the vindication of the important constitutional right of an accused to present witnesses in his own

defense. Supra at 302. The Chambers court relied heavily upon its prior ruling in Washington v. Texas, 388 U.S. 14, 19 (1967). In Washington, the court held:

> "The right to offer the testimony of a witness, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

Supra at 19. In the more recent decision of Crane v. Kentucky, 476 U.S. 683 (1986), the court held that the criminal defendant would be deprived of his fundamental constitutional right to a fair opportunity to present a defense, (whether under the Due Process Clause of the Fourteenth Amendment or under the Compulsory Process

or Confrontation Clauses of the Sixth Amendment), by the exclusion of testimony concerning the circumstances of an alleged confession. In so holding the court stated:

> "* * * Moreover, we have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interest of fairness and reliability--even if the defendant would prefer to see that evidence as admitted. Chambers v. Mississippi, 410 U.S. 284, 302 (1973). Nonetheless, without 'signal[ing] any diminution in the respect traditionally accorded to the states in the establishment and implementation of their own criminal trial rules and procedure,' we have little trouble concluding on the facts of this case that the blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial." Id. at 302-303.
>
> "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, Chambers v. Mississippi, supra, or in the Compulsory Process or

Confrontation Clauses of the Sixth Amendment, Washington v. Texas, 388 U.S. 14, 23 (1967); Davis v. Alaska, 415 U.S. 308 (1974), the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' California v. Trombetta, 467 U.S., at 485; cf. Strickland v. Washington, 466 U.S. 668, 684-685 (1984) ('The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment'). We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. In re Oliver, 333 U.S. 257, 273 (1948); Grannis v. Ordean, 234 U.S. 385, 394 (1914). The opportunity would be an empty one if the state were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.' United States v. Cronic, 466 U.S. 648, 656 (1984). See also

> Washington v. Texas, supra, at 22-23."

Supra at 690-691.

The United States Supreme Court in the decision of Rock v. Arkansas, 483 U.S. 44 (1987) had occasion to deal with another state blanket evidentiary exclusionary rule that challenged the constitutional principles embodied in both the Sixth and Fourteenth Amendments. The case dealt specifically with the question of the exclusion of post-hypnosis testimony of a defendant. In pertinent part the court held as follows:

> "Just as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony. In Chambers v. Mississippi, 410 U.S. 284 (1973), the Court invalidated a State's hearsay rule on the ground that it abridged the defendant's right to 'present

witnesses in his own defense.' Id. at 302. * * * This court reversed the judgment of conviction, holding that when a state rule of evidence conflicts with the right to present witnesses, the rule may 'not be applied mechanistically to defeat the ends of justice' but must meet the fundamental standards of due process. Ibid.

"Of course, the right to present relevant testimony is not without limitation. The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.' Id. at 295.[11] But restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify."

"[11]Numerous state procedural and evidentiary rules control the presentation of evidence and do not offend the defendant's right to testify. See, e.g., Chambers v. Mississippi, 410 U.S., at 302 ('in the exercise of this right, the

> accused, as is required of the state, must comply with established rules of procedure and evidence designed to ensure both fairness and reliability and the ascertainment of guilt and innocence');
> Washington v. Texas, 388 U.S. 14, 23, n. 21 (1967)(opinion should not be construed as disapproving testimonial privileges or nonarbitrary rules that disqualify those incapable of observing events due to mental infirmity or infancy from being witnesses)."

Supra, at 55-56.

The blanket exclusionary effect of the holding of the Oregon Supreme Court in petitioner's case, as fully explained in the Clowes, opinion, supra, as well, is the kind of evidentiary barrier so firmly disapproved of by the United States Supreme Court.

The effect of such a blanket exclusionary evidentiary rule was to deny petitioner his right to a jury trial. As

recognized by this court in Duncan v. Louisiana, 391 U.S. 145 (1968), the right to trial by jury in a criminal case is fundamental to our scheme of justice. As such, the Sixth Amendment's guarantee of right to trial by jury was extended to the states through the Fourteenth Amendment. The essence of the court's reasoning was that the very purpose of a jury trial was to prevent oppression by the government, supra at 155.

The right to a trial by jury would be an empty right were it not the right to a fair trial. As this court observed in U.S. v. Nixon, 418 U.S. 683 (1974):

> "* * * We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or

speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." Supra at 709.

"* * * *

"The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right 'to be confronted with the witnesses against him' and 'to have compulsory process for obtaining witnesses in his favor.' Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced."

Supra at 711. See also Pennsylvania v.

Ritchie, 480 U.S. 39, 55, 56 (1987)(a discussion of the contours of the Compulsory Process Clause); McCleskey v. Kemp, 481 U.S. 279, 305-306 (1987)(concerning a consideration of limitations a state may impose on the receipt of relevant evidence offered by the defendant in the penalty phase of a capital case); Taylor v. Illinois, 484 U.S. 400, 407-409 (1988)(construing the Compulsory Process Clause of the Sixth Amendment as being violated in some instances by a blanket exclusion of the testimony of a material defense witness, as a result of the imposition of a discovery sanction); and Coy v. Iowa, 487 U.S. 1012, 1015-1020 (1988)(finding a violation of the Confrontation Clause by a criminal procedural rule permitting a claimed victim of sexual abuse to testify from behind a screen to avoid viewing by the accused).

Each of the above-cited authorities represents a clear standard which has been enunciated by this court, designed to guarantee that the fundamental constitutional right to a fair trial before a jury of one's peers is not denied as a result of the erection of arbitrary evidentiary rulemaking by states. In petitioner's case, as in the companion Clowes opinion, supra, the Oregon court arbitrarily and unreasonably excludes relevant evidence in a mechanistic fashion, as a result of previously having declared that a defense of Choice of Evils is, as a matter of law, inconsistent with, in petitioner's case, pre-existing federal regulations purportedly permitting the practices complained of. In the Clowes, supra, rationale, similar reasoning was employed to justify the exclusion of all evidence establishing the defense of Choice

of Evils based upon the claimed inconsistency with the decision in Roe v. Wade, 410 U.S. 113 (1973) and Oregon statutory provisions regarding elective abortion. In petitioner's case, at least, the Oregon court is clearly in error in its conclusion that the defense of Choice of Evils is inconsistent, as a matter of law, with pre-existing federal regulations. See 9 C.F.R. § 3.1 et seq., which clearly does not sanction the practices and abuses of which petitioner complains. Further, as will be shown in the argument below, the Oregon court has misconstrued the clear legislative intent of the drafters of ORS 161.200, (Choice of Evils), so as to permit a trial court to review the merits of the substantive defense raised by proffered testimony and thereby preclude its reception and consideration by a trial jury. By such a mis-construction of the

unambiguous legislative history and intent of the drafters of ORS 161.200, petitioner's rights under the Sixth and Fourteenth Amendments have been abridged.

B. Under the facts of this case, the decision of the Oregon Supreme Court, holding, as a matter of law, that the defense of necessity may not be raised is in error. Under these facts, the defense of necessity is not inconsistent with another provision of law, to-wit: 9 C.F.R. § 3.1, et seq.

1. ORS 161.200 (Choice of Evils) is a Defense.

The Oregon statutory scheme clearly distinguishes between defenses and affirmative defenses. ORS 161.055 defines both:

> **"161.055 'Defense' and 'raised by defendant' defined; burden of proof.** (1) When a 'defense,' other than an 'affirmative defense' as defined in subsection (2) of this section, is raised at a trial, the state has the burden of

> disproving the defense beyond a reasonable doubt.
>
> "(2) When a defense, declared to be an 'affirmative defense' by Chapter 743, Oregon Laws 1971, is raised at a trial, the defendant has the burden of proving the defense by a preponderance of the evidence.
>
> "(3) The state is not required to negate a defense as defined in subsection (1) of this section unless it is raised by the defendant. 'Raised by the defendant' means either notice in writing to the state before commencement of trial or affirmative evidence by a defense witness in the defendant's case in chief."

Petitioner in this case raised the defense of Choice of Evils both by timely pre-trial notice and by attempting to offer affirmative evidence in his case-in-chief (see offer of proof).

Oregon's Choice of Evils defense, ORS 161.200, is contained within the general statutory section concerning

justification defenses. ORS 161.190, et seq. ORS 161.200 provides as follows:

> "(1) Unless inconsistent with other provisions of Chapter 743, Oregon Criminal Laws 1971 [the Oregon Criminal Code], defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when:
>
> "(a) That conduct is necessary as an emergency measure to avoid an imminent public or private injury; and
>
> "(b) The threatened injury is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.
>
> "(2) The necessity and justifiability of conduct under subsection (1) of this section shall not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a

particular class of cases arising thereunder."

Though the Choice of Evils justification defense afforded by ORS 161.200 may not be used as a way of challenging in blanket fashion the correctness of a particular criminal prohibition, (ORS 161.200(2)), its invocation necessarily raises at times difficult moral questions. The availability of the Choice of Evils defense is firmly rooted in English and American common law. According to the drafters of the Model Penal Code provision from which ORS 161.200 is, in part, derived (1971 Criminal Law Revision Commission Commentary, page 20 (Oregon District Attorneys' Association, December, 1975), Commentary to Preliminary Drafts Nos. 1 and 2 (1969) of Oregon Criminal Law Revision Commission Drafts of Articles Relating to

General Principles of Justification), the Choice of Evils defense, "like the requirements of culpability, is essential to the rationality and justice of all penal prohibitions." Page 5, Commentary to Sec. 3.02 of A.L.I. Model Penal Code, Tentative Draft No. 8 (1958). Moreover, that a Choice of Evils defense can provide no precise guide as to when otherwise criminal conduct is justified, "is not a serious objection to the rule," as many other concepts in criminal law also "call for weighing of conflicting values." Id., at p. 9.

In a case such as petitioner's, this weighing of conflicting values takes place on two occasions: first, when an individual, such as petitioner, is faced with a choice of conscience between inaction and action which, in the absence of justification, would be criminal, and

second, when the trier of fact evaluates the moral and legal correctness of the choice made by the individual. On neither occasion is the legislature involved, as, by enacting a statute such as ORS 161.200, the legislature has left judgment of the individual's conduct to him- or herself and, finally to citizen jurors. Stated more aptly, in this area, the people have not yielded to the government the power inherent in their sovereignty to act out of conscience, and to establish and safeguard values and moral norms.

2. Legislative History and Intent of Drafters of ORS 161.200.

In petitioner's case the trial court impermissibly weighed the merits, and categorically rejected, as a matter of law, petitioner's proffered Choice of Evils defense. In so doing, the trial court, with the affirmance of the Oregon Supreme

Court, impermissibly violated petitioner's right to present relevant evidence establishing the defense of Choice of Evils to a jury.

With respect to the legislative history and intent of the drafters of ORS 161.200, the records of the Criminal Law Revision Commission, which drafted the 1971 Criminal Code, and the legislative bodies that enacted it, make absolutely clear that the trial court is not to weigh the merits of proffered Choice of Evils evidence. Rather, the trial court is only to make the minimal threshold relevancy determinations for such proffered evidence. The first two preliminary drafts of the Choice of Evils statute contain an additional subsection (3), which would have expressly required the trial court to

undertake such a review, as a matter of law:

> "Whenever evidence relating to the defense of justification under [the choice of evils statute] is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a justification."

Article IV, Section 3, Preliminary Drafts Nos. 1 and 2. This proposed subsection was discussed at length by the subcommittee of the Criminal Law Revision Commission that was assigned to draft the justification statutes. A number of grave concerns about the advisability of such a trial court review were raised. First, it was noted that this provision constituted a major departure from existing law. Criminal Law Revision Commission, Subcommittee No. 1 Minutes, August 15, 1969, page 5. Serious concerns were also raised about the constitutionality of a procedure by which

issues of fact would be withdrawn from the jury. Id. It was also feared that this provision would unduly restrict the availability of the Choice of Evils defense. Id. at 6. Moreover, it was felt as a policy matter that the balancing of harms required by the Choice of Evils defense was more appropriately a task for the jury than the trial court. Criminal Law Revision Commission, Tape 80, Oregon State Archives. The subcommittee ultimately decided not to act on Subsection (3) before passing their draft on to the full Commission because a member was absent, and because they felt the issue merited further reflection. Id.

Subsection (3) was then given extensive consideration when the draft of the Choice of Evils defense was considered by the entire Commission. Concerns were again raised that such a trial court review

would constitute a denial of the right to jury trial. Criminal Law Revision Commission, November 7, 1969 Minutes, page 26. It was also noted that subsection (3) allocated the balancing of harms to the trial court, which was contrary to the thrust of subsection (1). Id. Concerns were also voiced about the feasibility of pre-trial review in light of the fact that an adequate presentation of the defense would not only require the defense to call its own witnesses but would also often involve cross-examination of the state's witnesses. Because of these concerns the Commission voted to delete subsection (3) and, thus, confine the role of the trial court to its normal role in evidentiary matters. Id. at 29.

The issue of trial court review of the Choice of Evils defense was again raised when the Commission's final draft

(introduced as Senate Bill 40) was considered by the Senate Committee on Criminal Law and Procedure during the 1971 legislative session. A proposed amendment to the bill that would have reinserted subsection (3) was rejected. Senate Criminal Law and Procedure Committee Minutes, February 26, 1971, page 5. Instead, both the Senate and the House passed the statute as drafted by the Commission. The Official Commentary to the final statute refers to the deletion of subsection (3) and expressly states that the trial court is only to rule on the "relevance and materiality" of the evidence.

The legislative determination that trial courts should not engage in a pre-trial review of the merits of a Choice of Evils defense has been faithfully adhered to by Oregon appellate courts, until

petitioner's case and that of State v. Clowes, supra. The lead case of State v. Matthews, 30 Or. App. 1133, 569 P.2d 662 (1977), held that if there is any evidence from which the elements of the defense can even be inferred, it must be submitted to the jury. In every other case in which Oregon appellate courts have upheld a trial court's withdrawal of the Choice of Evils defense, there has been a complete failure of proof as to one or more of the requisite elements of the defense. See State v. Whisman, 33 Or. App. 147, 575 P.2d 1005 (1978)(no evidence of imminence of injury); State v. Hund, 76 Or. App. 89, 708 P.2d 621 (1985)(no evidence of necessity).

Thus, the drafters of Oregon's Choice of Evils defense statute, along with prior appellate court decisions, clearly demonstrate that the trial court is not to first review the merits of the proffered

defense. As such, ORS 161.200 differs markedly from the Choice of Evils statutes of both Michigan and New York, which, together with the Model Penal Code, served, in part, as models for ORS 161.200, and which contain requirements for such preliminary rulings. Preliminary Draft No. 2 (1969) of Oregon Criminal Law Revision Commission Drafts of Articles Relating to General Principles of Justification. Subject, thus, to no special screening before presentation to the trier of fact, and rooted in the common law and in fundamental consideration of an accused's constitutional right of jury trial, the Choice of Evils defense is one which should always be considered seriously, and construed with a view toward protecting fundamental individual rights of the accused. As such, there is a clear legislative and prior appellate court

preference to the allowance of this defense when there is any evidence in the record from which the elements of a necessity defense may even be inferred. State v. Matthews, supra.

3. **Under the Facts of this Case Petitioner's Proffered Defense of Choice of Evils is not Inconsistent With Other Provisions of Law.**

ORS 161.200 was intended to be a Choice of Evils defense of general applicability. Although the Oregon criminal statutes include a variety of specific justification provisions, such as those addressing the justified use of force upon another person generally (ORS 161.205); the justified use of physical force upon a person in defense of another person (ORS 161.209) and ORS 161.215); the justified use of deadly force in defense of a person (ORS 161.219); the justified uses of force to defend

premises (ORS 161.255) and property (ORS 161.229); the justified uses of force in conjunction with arrests (ORS 161.235-.265); and the general justification of otherwise illegal conduct performed in order to execute supervening legal duties (ORS 161.195), no Oregon statute addresses the particular Choice of Evils faced by petitioner in the instant case. There is, therefore, no legislative foreclosure in this case of the defense afforded by ORS 161.200.

The only statutory provision which, though not specifically dispositive of petitioner's dilemma, offers some guidance as to values which may properly be considered by the trier of fact in its balancing of imminent harm to animal life against potentially criminal wrongdoing is ORS 811.180 (formerly ORS 487.560). ORS 811.180(1)(a) provides that "an injury

or immediate threat of injury to a human being or animal, and the urgency of the circumstances" constitute an affirmative defense to an individual's driving while his or her license is suspended or revoked. (Emphasis added). Through ORS 811.180(1)(a), the Oregon legislature clearly indicated that within the process of balancing competing values in a Choice of Evils analysis, there is a place for the valuation not only of human life, but of animal life, as well. Thus, by no means is the availability of the Choice of Evils defense lessened in the instant case by the fact that the conduct with which petitioner is charged was motivated by a belief in the sanctity of animal life. Moreover, that the crimes charged in this case are felonies, or forcible in nature, does not deprive petitioner of the protections of ORS 161.200, as the statute is not limited

in its application to any class or description of offenses.

To the contrary, examples of proper applications of ORS 161.200 cited by its drafters included acts as destructive as the blasting of buildings and forced entry into an unoccupied house. 1971 Criminal Law Revision Commission Commentary, page 20 (Oregon District Attorneys' Association, December, 1975). Along similar lines, the drafters of the Model Penal Code precursor to ORS 161.200 stated that:

> "We see no reason why the scope of the defense ought to be limited to cases where the evil sought to be avoided is death or bodily injury or any other specific harm; nor do we see a reason for excluding cases where the actor's conduct portends a particular evil, such as homicide. The principle involved is one of general validity."

Page 7, Commentary to Sec. 3.02 of A.L.I. Model Penal Code, Tentative Draft No. 8 (1958).

Further evidence that petitioner's asserted Choice of Evils defense under ORS 161.200 is not inconsistent with any other provision of law can be seen by reference to various provisions of Oregon state law relating to the treatment of animals. ORS 167.310 et seq. For example, the lack of post-operative care to primates in a laboratory facility clearly would constitute a failure to provide "minimum care" under ORS 167.310(2)(d). As part of petitioner's proffer evidence of that as well as inadequate housing of primates was adduced. ORS 167.310(2)(e). Frankly, when taken in its totality, petitioner's proffered evidence made a prima facie case of Animal Neglect in the First and Second Degrees. ORS 167.325 and 330. Further reference may be had to various provisions of federal regulations concerning the

provisions of veterinary care for research animals. See, e.g., 9 C.F.R. § 3.84(a)(b).

Implicit in the reasoning of the Oregon court is its fundamental decision to restrict the applicability of the Choice of Evils defense in instances analogous to petitioner's to those in which the conduct complained of by petitioner is illegal. Such is contrary to the clear legislative history and intent of the drafters of ORS 161.200 and amounts to an arbitrary and unreasonable restriction upon the exercise of petitioner's fundamental right to present a defense in a jury trial. In support of this impermissible premise, the Oregon court in petitioner's case reasoned as follows:

> "The decisive question, however, is whether defendant's use of the defense here would be 'inconsistent * * * with some other provision of law.' State v. Clowes, supra, ____ Or App at _____. Extensive federal regulations govern

> the treatment of animals used in the experiments that the laboratories were performing. See 9 CFR § 3.1 et seq. For this purpose, regulations authorizing conduct have the same effect as statutes authorizing conduct. Although defendant alleges in his brief that the laboratory that he helped to raid was violating several regulations, he does not point to any evidence in the record that would support those allegations. Accordingly, federal law expressly allows what the victim of the crime was doing, so defendant may not offer a choice of evils defense when he interfered with that activity because of his belief that what the laboratory was doing is morally wrong."

Supra, Appendix D, page 4. In a similar fashion, in the Clowes decision, the Oregon Supreme Court, in pertinent part, reasoned as follows:

> "Let us now turn to ORS 161.200. To determine whether the choice of evils defense set forth in ORS 161.200 is available to defendants in this case, we must first decide whether to permit its use by them would, in the words of subsection (1), be 'inconsistent * * * with some other provision of law,' as that phrase has meaning in the context of ORS 161.200(1). If allowing the defense would be

'inconsistent with some other provision of law,' it may not be asserted. If not, then the availability of the defense is dependent upon whether the other preconditions to its use set forth in ORS 161.200 are satisfied.

"The phrase 'inconsistent with some other provision of law' is not defined in the statute. It is appropriate, therefore, to examine legislative history surrounding the enactment of ORS 161.200 for clues to that phrase's meaning.

"ORS 161.200 was enacted as section 20 of the 1971 revision to the Oregon Criminal Code. The commentary to the Proposed Oregon Criminal Code Section 20 states that it was derived from Model Penal Code Section 3.02, New York Revised Penal Law Section 35.05(2) and proposed but not enacted Michigan Revised Criminal Code Section 605. Subsection (1) of ORS 161.200 is substantially similar to the proposed Michigan statute. Under the proposed Michigan statute, the defense is available '[u]nless inconsistent with other provisions of this chapter defining justifiable use of physical force, or with some other provision of law.' (Emphasis added.) Proposed Michigan Revised Criminal Code Section 605(1). The Model Penal

Code counterpart permitted the defense if:

> "'(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
>
> "'(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
>
> "'(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.'

Model Penal Code Section 3.02(1) (1962) Official Draft.

"The New York statute makes the defense available '[u]nless otherwise limited by the ensuring provisions of this article defining justifiable use of physical force[.]' New York Penal Law Section 35.05(2).

"There is little in the legislative history of ORS 161.200 that helps us to discern what the legislature

intended by the broad language 'inconsistent * * * with some other provision of law.' It is apparent, however, that that language is more restrictive than its New York counterpart. It also is clear, as the majority of the Court of Appeals said, that the phrase 'inconsistent * * * with some other provision of law,' as used in the Oregon statute, does not 'mean[] the same thing as § 3.02(1)(c) of the Model Penal Code. ORS 161.200(1) does not require, as does the Model Penal Code, an express legislative foreclosure of the defense; it requires only that the defense be inconsistent with some other provision of law.' State v. Clowes, supra, 100 Or App at 272.

"In City of St. Louis v. Klocker, 637 SW 2d 174 (Mo App 1982), three defendants were charged with trespass after they had entered an abortion clinic, attempted to dissuade patients from having abortions by detailing their physical and psychological dangers, and blocked access to the procedure rooms by sitting in a doorway. At the trial on charges of trespassing, they raised the statutory affirmative defense of necessity. The defendants contended that the injury avoided by their conduct was the 'killing of human life' by the abortions

of unborn fetuses. The Missouri Court of Appeals ruled as a matter of law that the defense was not available to the defendants. The court stated, inter alia, that the Missouri statute [§ 563.026 RSM 1978] provides that necessity is available as a defense only if it is not '"inconsistent * * * with some other provision of law."' Id. at 177. The Missouri court interpreted that language to 'simply mean[] that the legislature's decision prevails if and when it makes specific value choices,' and that '"competing values which have been foreclosed by deliberate legislative choice are excluded from the general defense of justification[.]"' Id. The court found that the Missouri legislature had made specific value choices in the area of abortion.

"We believe that the interpretation given by the Missouri court captures the essence of what the Oregon legislature intended by its conscious choice to include the broad language 'inconsistent * * * with some other provision of law' in ORS 161.200(2). The Oregon legislature made a deliberate value decision when, in 1983, as previously discussed, it repealed the Oregon statutes that restricted a woman's right

> to terminate her pregnancy and enacted law that assumes abortions will be performed. Here, the actions that defendants sought to prevent were actions permitted under Oregon law. The interests that defendants seek to vindicate are not, therefore, consistent with that legislative decision. The present state of Oregon law is that a decision to terminate a pregnancy is a matter between a pregnant woman and her doctor. Hence, the defense of choice of evils, ORS 161.200, is unavailable to defendants in this case because it is, in the words of the statute, 'inconsistent * * * with some other provision of law.' ORS 161.200(1)."

State v. Clowes, supra, at 696-698 (Appendix F).

In petitioner's case, by analogy and direct reference to Clowes, supra, the Oregon court finds petitioner's asserted defense of Choice of Evils inconsistent with federal regulations regarding research animals. Simply stated, the Oregon court is plainly in error. The mere existence of a federal regulatory scheme, such as that

as described in the Animal Welfare Act, 7 U.S.C. § 2131ff, does not preempt petitioner's use of a state Choice of Evils defense for challenging activities generally regulated by a federal scheme. Moreover, the Animal Welfare Act contains no requirements as to "design, outline, guidelines, or performance of actual research or experimentation by a research facility." 7 U.S.C. § 2143. Consequently, it may not be claimed that there is federal approval for any particular experimental procedures undertaken at the University of Oregon animal laboratories. Rather, that is properly a factual decision to be made by a jury, pursuant to ORS 161.200. This court is also referred to the special concurring opinion of Judge Rossman in the Oregon Court of Appeals opinion in State v. Clowes, 100 Or. App. 266, 278-283 (1990) in which the author registers serious concern

with the majority's rationale for exclusion of the Choice of Evils defense because abortion is neither a "public or private injury" under the statute. The Justice properly suggests that such reasoning would lead to the withdrawal of this defense from defendants for whom it was meant to be available. By analogy, the reasoning of the Oregon court in petitioner's case is similarly flawed.

IX. CONCLUSION

In order to vindicate petitioner's fundamental constitutional rights assured under the Sixth and Fourteenth Amendments to the United States Constitution,

petitioner respectfully urges this Court to grant his petition for certiorari.

DATED this 8TH day of MAY, 1991.

Respectfully submitted,

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